BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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| In the Matter of<br><br>Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers | CC Docket No. 01-338 |
| Implementation of the Local Competition Provisions of the Telecommunications Act of 1996 | CC Docket No. 96-98 |
| Deployment of Wireline Services Offering Advanced Telecommunications Capability | CC Docket No. 95-185 |

**COMMENTS OF THE PEOPLE OF THE STATE OF CALIFORNIA AND THE CALIFORNIA PUBLIC UTILITIES COMMISSION**

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## SUMMARY

In the six years that have elapsed since the adoption of the Telecommunications Act of 1996, the incumbent local exchange carriers ("ILECs") remain the dominant providers of broadband services to residential and small commercial customers in California. Currently, one-third of all Californians live in cities where DSL service is the only choice for broadband service. Because of the high cost of upgrading cable facilities, broadband services over cable facilities are limited to certain suburban residential communities with some spotty coverage in urban areas. Wireless broadband services are offered on an even more limited basis. Moreover, only one DSL competitor to Pacific/SBC remains today of the handful that competed just two years ago.

Against this competitive backdrop, the FCC's decision to reconsider the unbundling obligations applicable to ILECs comes at a critical time. The need for regulatory certainty and stability is essential if competing carriers are to enter, and remain, in local markets, and the consumer benefits of the 1996 Act – i.e., a wide range of choices of services at lower prices -- are to be finally and fully realized.

California therefore urges the FCC not to reduce the unbundling obligations of the ILEC unless there is a clear and convincing need to do so. While California appreciates the need to encourage the ILEC to continue to invest in its network, such investment must not come at the expense of reduced competition, and thus fewer options from which consumers may choose among carriers and services.

To ensure certainty and stability, California urges the FCC to maintain unbundling rules that are clear and simple. Targeting unbundling rules based on type of provider or type of service should be avoided as discriminatory, likely to spur arbitrage, and likely to lead to prolonged disputes, delay and further marketplace uncertainty and instability. California believes that advanced telecommunications capability should correspond to the service provided based on the types of facilities over which the service is offered, and the types of broadband equipment used to generate and transport the service. In addition, unbundling rules should apply both to overlays of existing facilities and upgraded new facilities. An overlay network can provide the same degree of new technological advances as newly-installed facilities, such that access to both is equally important.

The FCC should not adopt temporal or non-temporal triggers for modifying the unbundling rules, but instead should assess the actual state of competition in local markets periodically before deciding whether to modify or eliminate its rules.

With respect to specific network elements, California urges the FCC to maintain its unbundling requirements for loop capacities, the network interface device and dark fiber -- i.e., last mile facilities – because no significant competition currently exists for the vast majority of the ILEC's local customers. All types of loops, from traditional copper to all fiber, should be unbundled. In addition, the FCC should consider keeping existing loop facilities in place when new fiber loop facilities are deployed. Unbundling requirements should not be differentiated by new or overlay facilities, which could skew ILEC investment

decisions regarding network design and timing. Further, the FCC should not distinguish between loops capable of providing voice and broadband services, and should continue to require the ILEC to provide access to the high frequency portion of the loop to enable line sharing. The FCC should also retain its requirement that the ILEC provide DS1 loops, since in most markets no alternative supplier exists, and such access by competing carriers has enabled them to provide integrated voice and data services that directly compete with the ILEC.

For the same reason, California urges the FCC to retain its requirement that the ILEC unbundle access to local switching and tandem switching capabilities by non-facilities based competitors. The FCC should update its unbundling requirements for access to packet switching to account for how the industry has evolved. Similarly, access to interoffice transmission facilities is essential if wireline competition for ILEC broadband services is to fully develop. The FCC should not reduce access by competitors to the ILEC's Operations Support Systems functions. Nothing can impair a competitor's successful entry into a market more effectively than slow, inefficient and inaccurate methods for processing customer orders and service requests.

Lastly, California urges the FCC to continue to allow states to supplement current unbundling requirements, tailored to particular local market conditions. As the FCC previously recognized, the degree of competition in individual geographic markets may differ in a manner that states are best positioned to address. Allowing the states to specify additional requirements is expressly

permitted by the 1996 Act, consistent with the principle of cooperative federalism underlying the Act, and consistent with the Act's goals of competition, lower prices for services and enhanced consumer choice.

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The People of the State of California and the California Public Utilities Commission ("California" or "CPUC") hereby file these comments in response to the Notice of Proposed Rulemaking ("NPRM") issued by the Federal Communications Commission ("FCC") in the above-captioned proceedings. In this NPRM, the FCC initiates its first triennial review of federal policies on unbundled network elements ("UNEs"). As noted by the FCC, this proceeding is one of several in which the FCC is broadly reviewing its competition policies in light of experience gained since the enactment of the Telecommunications Act of

1996 ("1996 Act" or "Act"). Among other things, the FCC is considering whether to adopt national performance measures and standards that ensure compliance by incumbent local exchange carriers ("ILECs") with their wholesale obligations under section 251 of the 1996 Act. The FCC is also considering the regulatory classification of broadband services and how to regulate broadband services offered by local exchange carriers. In the instant proceeding, the FCC seeks to review the unbundling requirements imposed on ILECs, seeking comment on which facilities the ILECs should unbundle, with a particular focus on facilities used to provide broadband services.

## I. BACKGROUND

In response to the United States Supreme Court's decision in AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366 (1999), the FCC adopted the UNE Remand Order to address two principal issues: (1) a definition of the standard for determining the network elements which incumbent LECs should unbundle and provide to competitive local exchange ("CLECs") carriers under section 251(d)(2) of the 1996 Act; and (2) identification of a list of specific network elements that, at a minimum, incumbent LECs must unbundle and provide to CLECs under that standard. In addressing these two issues, the FCC recognized that Congress' objective in promoting full and fair competition in the local telecommunications market is dependent upon making available network elements that are necessary for the rapid and efficient deployment of all telecommunications services. After defining the appropriate standard to determine whether certain network elements

should be unbundled, the FCC identified seven network elements that it deemed necessary for ILECs to make available to requesting carriers.[1]

In this NPRM, the FCC seeks to refine and target its unbundling requirements. Specifically, the FCC seeks to ascertain "more precisely the impairment facing requesting carriers" in determining whether an ILEC should unbundle particular facilities. NPRM, ¶ 2. Towards this end, the FCC seeks comment on how to apply the applicable statutory standards in light of the experience gained and the technological changes that have occurred since the adoption of the 1996 Act. Among other things, the FCC asks for comment on how to weigh the goals of the 1996 Act for the purpose of refining its unbundling analysis; whether the statutory language supports unbundling obligations that are more targeted; and how to apply the unbundling analysis to define specific network elements. NPRM, ¶ 16.

Currently, the CPUC is considering the scope and extent of unbundling requirements for the broadband services, known as Project Pronto, offered by Pacific/SBC, and PARTS, offered by Verizon, the incumbent LECs in California. Among the issues under consideration is whether the next generation loop carrier

[1] These seven UNEs are (1) loops, including high-capacity lines, dark fiber, line conditioning, and some inside wire; (2) subloops; (3) network interface devices; (4) local circuit switching, but not most packet switching; (5) interoffice transmission facilities, including dedicated transport from DS1 to OC96 capacity levels and such higher capacities as evolve over time, dark fiber, and shared transport; (6) signaling networks and call-related databases; and (7) operations support systems.

("NGDLC") should be unbundled to allow competitors to install compatible cards with alternative functionality to that of the incumbent local exchange carrier. The CPUC is also considering whether NGDLC technology or quality of service classes (e.g., bit rates) should be limited by the incumbent carrier, and if the incumbent should be required to pass packet switched data from a central office to the competitive carrier's point of presence, whether or not the carrier is collocated with the incumbent. The CPUC is further considering whether packet switching under Pacific/SBC's Project Pronto should be defined as an unbundled network element.

Also under review before the CPUC is Pacific's application under section 271 of the Act to enter the long distance market. Among other things, the CPUC is considering the adequacy of access by competitors to Pacific's OSS functions.

In light of the pendency of these state proceedings, California is unable to comment on similar issues posed in this NPRM. California anticipates issuing decisions in these matters in the near future, and will submit them in this proceeding upon their issuance.

In these comments, California addresses the issues discussed below.

## II. FRAMEWORK FOR UNBUNDLING

### A. State of the Market and Policy Guidelines

Six years have elapsed since the adoption of the 1996 Act. In this timeframe, the CPUC optimistically oversaw a large amount of investment by

CLECs seeking to compete with the incumbent carrier in local markets in California. Only a few short years later, a number of CLECs were forced to exit many of these markets. As a result, CLECs are in a much weaker position today than just two years ago, and there is no indication that this situation will reverse anytime soon. The remaining CLECs competing today have less ready access to capital, and cannot afford to take the risks that they may have found acceptable a short time ago. To remain viable, many CLECs must take advantage of facilities that are already "in the ground," but in order to do so, they need access to a complete offering of UNEs that is financially attractive and available without impediments imposed by the ILEC.

The FCC's decision to reconsider its unbundling policies thus comes at a critical time. Without proper recognition of the actual state of competition, an FCC order could harm rather than promote competition if based on assumptions that the competitive market is progressive and healthy.

As a general matter, California urges the FCC not to reduce the unbundling obligations imposed on ILECs unless there is a clear and convincing need to do so. Indeed, given current market conditions, it may be appropriate to require more, not less, unbundling. The FCC's policies on UNEs should also be as simple and clear as possible so as to reduce the ability of ILECs to take advantage of any loopholes or ambiguities that lessen their unbundling obligations. The FCC should thus refrain from adopting detailed, complicated requirements. Among other things, detailed rules that allow ILECs to avoid unbundling requirements in certain

situations could skew the ILECs' decisions regarding network design and the timing of investment decisions. Detailed rules may further fail to take into account unanticipated changes in the market, or be based on unrealized assumptions about the development of the market (e.g., facilities-based competition will flourish), risking a return to monopoly conditions. In addition, rules that allow unbundling requirements to change over time magnifies the risks faced by CLECs which would no longer be able to rely on the availability of certain UNEs in the foreseeable future.

In short, the more stability and regulatory certainty that the FCC can provide to the CLEC community, the lower the risk that more CLECs will exit, or decline to enter, local markets, with the greater likelihood that consumers will finally and fully realize the benefits of the 1996 Act.

### B. Goals of the 1996 Act

The central purpose of the 1996 Act is to spur competition so that consumers have a broader range of choices among telecommunications services and providers, and access to services at lower prices. Competition in turn fosters innovation and development of new technologies to better serve customers. The goal of encouraging investment in new technologies, however, should not be an end in itself. Rather, that goal is the product, not the purpose, of competition, and should not come at the expense of reduced choices of services at lower prices for customers.

Against this backdrop, Congress intended the FCC to focus primarily on whether the incumbent provider of local services continues to exercise control over bottleneck network facilities needed by competing carriers, and how to unbundle those network facilities to enable competitors to meaningfully compete with the incumbent provider for customers. Nothing in the Act indicates an intent by Congress to reduce the degree of unbundling of *bottleneck* facilities by the incumbent provider for the purpose of promoting new investments by that provider.[2]

In California, ILECs remain the dominant providers of local services to the vast majority of customers in the areas in which they serve. This is particularly true in broadband service markets to residential and small commercial customers. In addition, more California customers are served by Pacific Bell/SBC's DSL service than by competing cable modem services, and SBC's market share is growing. Currently, in California, there are 735,677 ADSL lines and 609,174 cable lines provided by both ILECs and CLECs. The vast majority of the ADSL lines are provided by Pacific Bell/SBC.[3] And significantly, 11 million

[2] Indeed, in Section 271(c)(2)(B)(iv, v, vi, vii, vii), a Bell Operating Company seeking to enter the long distance market is required to offer unbundled local loops, local transport, local switching and access to other facilities and services without regard to the "necessary and impair" standard set forth in sections 251(c)(3).

[3] In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability, Third Report, FCC 02-33 (February 6, 2002).

Californians, or one-third of all Californians, live in cities where DSL service is the only choice for broadband service.[4]

As the dominant provider of broadband services in California, unbundling requirements applicable to Pacific/SBC must therefore remain in place if significant competition is to become a reality, and its benefits brought to California customers. Indeed, the fact that Pacific/SBC has successfully promoted DSL service to customers under the current regulatory environment to the point of outstripping cable modem service makes clear that the current regulatory environment is conducive to, and does not impede investment in, broadband technology by the ILEC.

### C. Encouraging Facilities Investment and Broadband Deployment

In its NPRM, the FCC seeks comment on the interplay between sections 251 and 706 of the Act, which respectively encourage the promotion of local competition and investment in infrastructure. NPRM, ¶ 23. Specifically, the FCC asks whether it should modify or limit an ILEC's unbundling obligations going forward so as to encourage investment in new construction. NPRM, ¶ 24.

California appreciates the need to encourage ILECs to continue to invest in their networks. At the same time, encouraging ILEC investment must not come at the expense of reduced competition from competing carriers, and thus fewer

[4] This data was provided by California ILECs and the California Cable and Telecommunications Association to the CPUC.

options from which consumers may choose among carriers and services. To be sure, the primary goal of the 1996 Act is to promote lower prices, greater choice of services and innovation through competition. That goal is realized by ensuring that ILECs unbundle their local networks sufficiently to permit both facilities-based and non-facilities-based entry by competing carriers on a "level playing field." Unless and until it can be shown that robust local competition is actually present in local markets – both residential/small business as well as large business – and the ILEC no longer controls bottleneck facilities needed by competing carriers to reach end-use customers, the FCC should not reduce an ILEC's unbundling obligations.

California recognizes that over the past five years the deployment of broadband service has increased dramatically. Most notably, the nation's fiber "backbone" network that includes the Internet has grown to very fast data rates of OC-768. Fiber optics and new Asynchronous Transfer Mode/Internet Protocol ("ATM/IP") equipment spurred this increase in investment in the broadband backbone network. As a result, a number of CLECs have focused on providing fiber backbones, contributing to increased data rate capacity and lower rates for consumers for Internet services.

At the same time, while investment and competition in providing backbone-based Internet services have soared, little if any competition has occurred in the local loop – the so-called "last mile" necessary for an end-user customer to access the Internet. In fact, in the last two years, a large number of

competitors offering DSL services in competition with the ILEC have exited the market. For example, in 1997 in California there were three wholesale providers of DSL service in competition with Pacific Bell/SBC's DSL service. Five years later, in 2002, there is only one DSL competitor.[5] Thus, while as a result of California's regulatory pressure on the incumbent LECs (Pacific and Verizon), the data CLECs were able to enter the local market quickly and much earlier than the rest of the nation in providing DSL services to California customers, much of that competition has since evaporated. Customers, in turn, have been left not only with fewer choices, but in some cases, without service at all when a CLEC has been forced to cease its broadband operations.

It is therefore essential that the FCC maintain its existing unbundling obligations for ILECs if the 1996 Act's goals of lower prices, greater choice of services and innovation through competition are to be fully realized. Investment in new construction is not an end in itself if competition is reduced and consumer choice is limited.

In its NPRM, the FCC asks whether it should consider overlays of existing facilities with upgraded new facilities in defining unbundling obligations. NPRM, ¶ 24. California believes that the FCC should. An overlay network can provide the same degree of new technological advances as newly installed facilities. At

[5] Covad is the last remaining provider of DSL service based in California, and is partly owned by Pacific/SBC. Pacific/SBC is by far the most dominant when it comes to DSL market share through its affiliate, ASI. ASI was initially part of Pacific and as a result was able to gain and hold its market share due to efficiencies that a non-affiliate would not otherwise obtain.

the same time, an overlay network can isolate and exclude competition just as easily as upgraded new facilities. In addition, the development of innovative technologies will depend on the ILEC's business plan, which may not include a customer's need for diverse products and services. The application of unbundling requirements to overlay networks is therefore equally as important as the application of such requirements to new facilities.

The FCC next asks whether, in encouraging the deployment of advanced telecommunications capability, this capability should correspond to a facility, a service, a market, or something different. NPRM, ¶ 26. The FCC also asks whether this capability is only necessary with respect to loops or other "last mile" facilities.

California believes that advanced telecommunications capability should correspond to the service provided based on the types of facilities over which the service is offered, and the types of broadband equipment used to generate and transport the service. The type of service available is determined by the facilities that are available and by the different types of broadband equipment utilized, which will determine the functionality and availability of broadband service to the residential and business markets. The FCC should not limit the scope of advanced telecommunications capability to the "last mile" facilities.[6]

[6] The FCC also asks whether access service revenues should be protected from UNE-P competition. NPRM, ¶ 32. California believes that such protection is inconsistent with the FCC's approach to access charge reform, which has been to rely on the market to drive access prices toward cost. To be consistent, EEL competition should be welcomed and encouraged.

The FCC seeks comment on the extent that cable and wireless technologies have been deployed to support voice and broadband services as an alternative to ILEC services. NPRM, ¶ 27. As previously discussed, the data supplied by California ILECs and the California cable industry to the CPUC show that one-third of all Californians live in cities where DSL service is the only choice for broadband service. Broadband cable service is limited to areas where the cable plant has been upgraded. However, because of the very high cost of upgrading, in California service is provided only in suburban residential communities with some spotty coverage within the downtown areas. The upgrading of cable plant to enable expanded cable broadband service coverage continues to lag behind DSL market expansion. Voice over cable is available in even more limited areas due to the requirements of additional plant and equipment upgrades, which are extremely costly. Wireless technologies used to support broadband service are not widely deployed in California.

In short, alternative technologies to an ILEC's broadband services are not ubiquitously available. Because the ILEC remains the dominant provider of these services, it is premature to reduce the unbundling obligations imposed upon it.

### D. More Granular Statutory Analysis

In its NPRM, the FCC seeks comment on whether and how to take geography into account in the unbundling analysis. California believes that geography must be considered. In California, there is a great disparity between

the availability of DSL broadband services, with the majority of services provided in urban, not rural areas. Additionally, there exists a great disparity between the availability of DSL service for those who are located greater then 17.5 Kft from the ILEC's central office, due to the limitations of DSL over home-run copper. In areas where Pacific/SBC has deployed Project Pronto, this disparity is disappearing but requires competitive access to pressure the incumbent LEC to continue to expand its broadband access technologies.

To the extent that broadband service is even offered in rural areas, cable modem technology is not widely available, and broadband service most likely is only available from the incumbent LEC. The only viable competition would be from a data CLEC which relies in large part on the continued regulatory requirements for the incumbent ILEC to offer UNEs. In suburban areas, cable modem access does provide an alternative to the ILEC's DSL service but, as discussed above, it is not ubiquitously available in all of these areas. The only viable competition is again from competing local exchange carriers. In short, current unbundling requirements should be maintained in all geographic regions in California if significant competition is to ever develop.

The FCC next seeks comment on whether the unbundling rules should differ for facilities serving larger business customers compared to residential and small businesses. For large business customers in certain major urban markets, there may be a level of competition which could justify a reduced degree of unbundling. At the same time, however, large businesses may be located in major

urban areas where few competitors exist. In these circumstances, the degree of unbundling should not be modified. The FCC should therefore not adopt a blanket rule governing unbundling rules for larger business customers.

California further believes that residential and small business customers require low cost access to DSL technology. In contrast, medium and large business require higher bandwidth needs, such as DS1 and DS3. Because of the significantly larger cost of a DS1 line, as a practical matter, access to DSL technology is the only cost-effective option for residential and small business customers. The FCC's unbundling requirements for DSL access should therefore be maintained to ensure inexpensive access to broadband service.

California believes that unbundling rules which depend on the service that the requesting carrier seeks to provide would be discriminatory and contrary to the Act. Additionally, any kind of differentiation would raise administrative enforcement and arbitrage problems. The same concerns about discrimination, enforcement, and arbitrage arise if access to UNEs is determined by the type of carrier, or the particular characteristics of the carrier seeking such access.

In sum, the FCC should refrain from adopting more detailed, complicated unbundling requirements. The FCC should endeavor to adopt requirements that are as clear and simple as possible to ensure stability and regulatory certainty necessary to promote and maintain competition and its consumer benefits.

### E. Triggers for Changes in UNE Availability

In its NPRM, the FCC asks for comment on whether temporal or non-temporal triggers should be adopted for determining the continued availability of particular UNEs. NPRM, ¶¶ 45-46. Neither type of trigger should be adopted.

California believes that an automatic sunset procedure would be arbitrary, and would fail to take into account the actual state of development of alternative UNE providers. Among other things, it would be based on untested assumptions about the degree of competition that is likely to develop in the local exchange market and the UNE market by the sunset date.

Moreover, an automatic sunset provision would significantly raise the entry barriers faced by CLECs. An automatic sunset provision will likely have a chilling effect on their development, and make such carriers less likely to pursue a business plan based on temporary access to the incumbent's network that will be revoked by a date certain, whether or not alternative sources of facilities develop. Further, a sunset date would increase litigation costs and cause delays in service provisioning even if competitive carriers are successful in having access to UNEs reinstated after the date of sunset.

Non-temporal triggers would inhibit competition in the same manner as temporal triggers.[7] Rules that allow unbundling requirements to change over time,

[7] An example is access to collocation space in a central office. Currently, in order to provide DSL service to customers, a CLEC must be collocated. The fact that a CLEC has access to the incumbent's EEL product is immaterial because DSL service will not work with EEL. Access to EEL should not result in removal of the ILEC's collocation obligation.

e.g., based on the future development of other competitors, would be a tremendous impediment to carriers trying to develop business plans. CLECs need regulatory certainty that the UNEs they are relying on now will still be offered in the future. It would not be adequate to simply grandfather UNEs that an ILEC would no longer be required to offer. Carriers need to know that they can offer service to new customers and buy additional UNEs for the foreseeable future. In addition, non-temporal triggers would necessitate undue micromanagement by the FCC to determine whether those triggers were met, leading to inevitable dispute, delay, and further marketplace uncertainty.

In sum, the FCC should not adopt temporal or non-temporal triggers to modify unbundling requirements. Instead, the FCC should undertake a periodic review, as it has done here, to assess the state of competition for services in local markets and to determine the continuing need for particular unbundling requirements in light of actual, competitive conditions.

## III. SPECIFIC NETWORK ELEMENTS

As discussed above, the CPUC is currently considering the scope and extent to which an incumbent LEC should unbundle its packet switching services, such as Pacific/SBC's Project Pronto. As a result, California is unable to comment on a number of issues raised in this NPRM. As a general matter, however, no competitive carrier should be placed at a significant disadvantage to the incumbent carrier because of inferior access to facilities, services or

technologies.

### A. Loop, Subloop and Network Interface Devices

In its UNE Remand Order, the FCC found that competing carriers were impaired without access to all available loop capacities, the network interface device ("NID") and dark fiber. In its NPRM, the FCC seeks comment on whether the unbundling requirements for these network elements should be maintained. NPRM, ¶ 48.

California believes that they should. These network elements comprise the "last mile" from the ILEC to the customer, for which no significant competition exists for the vast majority of the ILEC's local customers. Inasmuch as the ILECs have already built the "last mile" bottleneck facilities and made them available to competitors, there is no undue burden upon the ILECs in continuing to unbundle the network elements of these facilities. By combining any of these UNEs, the outcome will be reduced access to the local loop network. Combining the NID, subloop, and loop will require a CLEC to build its own loop facilities and NID, which is economically prohibitive. California is unaware of any alternative, less burdensome options available to achieve the goals of the Act.

California agrees that defining loops based on bandwidth is reasonable so long as the associated electronics are included. California urges the FCC to require unbundling of all types of loops with associated electronics, whether

traditional all copper, or new hybrid mix of fiber and copper, or an all fiber loop. All loops defined based on bandwidth must be accessible to competitors.

The FCC next asks for comment on how it should treat deployment of new facilities by ILECs for the purpose of the FCC's loop unbundling requirements. NPRM, ¶ 50. In general, all loop facilities should be unbundled, whether new or as an overlay to existing facilities. Unbundling requirements that are differentiated by whether facilities are new or overlay could skew ILEC investment decisions regarding network design and timing, and therefore should not be adopted.

The FCC should consider keeping existing loop facilities in place when new fiber loop facilities are deployed in order to allow data CLECs to provide certain types of DSL technologies that are not yet available over fiber-fed networks. Additionally, keeping existing loop facilities in place will allow CLECs to purchase these facilities as a UNE in lieu of reselling Pacific/SBC's Project Pronto service.[8]

California also believes that the FCC should not distinguish between existing and new network facilities in determining unbundling requirements. The FCC should not consider these overlay or new facilities as multiple alternatives, thus alleviating the incumbent LECs from any of their unbundling obligations.

[8] Until there are regulatory changes which would allow CLECs to install line cards into NGDLC and offer new technologies which are available but not provided by Pacific/SBC to its customers, CLECs can only repackage Pacific/SBC's offering.

These overlay network facilities, which can provide the customer with higher bandwidth, must be unbundled in order to allow for competition. Absolving the ILEC from any unbundling obligations on an overlay network will inhibit a competitor's ability to provide comparable services to those of the ILEC, such as Pacific Bell/SBC's Project Pronto.

California further urges the FCC to retain the requirement that ILECs provide access to the high frequency portion of the loop necessary for the provisioning of line sharing arrangements between the ILEC and a CLEC. Retaining this requirement is imperative in order to allow the CLEC parity with the ILEC's affiliate in providing advanced services. Removing this requirement would require the CLEC to buy UNE loops while the ILEC affiliate could provide the same service at lower cost because of its ability to share the loop costs with the ILEC.

California also urges the FCC to retain the unbundling requirement that ILECs must provide DS1 loops on a wholesale basis to CLECs. This unbundling requirement is crucial because CLECs purchase DS1 loops solely from the ILEC. DS1 is used by CLECs to provide fast growing, integrated voice and data service that competes directly with the ILEC, and offers technical benefits and cost savings to consumers. There is no alternative supplier. If DS1 unbundling requirement is lifted, this fast growing, lucrative and economically important market will fall totally into the lap of the ILEC.

### B. Switching

In its NPRM, the FCC asks whether it should retain or modify its requirement that ILECs provide unbundled access to local switching and tandem switching capabilities. NPRM, ¶ 55. California urges the FCC to retain this unbundling requirement in order to enable non-facilities-based CLECs to have access to the UNE-platform to self-provision or partner with a data carrier to provide voice and data services on the same line (line splitting). In its UNE Remand Order, the FCC defined "packet switching capability" as "routing or forwarding packets, frames, cells or other data units based on address or other routing information contained in the packets, frames, cells or other data units" as well as the functions performed by DSLAMs. The FCC required ILECs, in limited circumstances, to provide access to "packet switching capability." NPRM, ¶ 61.

California believes that the FCC should modify the requirements under which an ILEC must provide CLEC access to packet switching. Specifically, the FCC should re-examine the elements required for unbundling packet switching in light of how the industry has evolved since their adoption. Packet switching unbundling is imperative if broadband competition is to emerge.

### C. Interoffice Transmission Facilities

Previously, the FCC found that requesting carriers are impaired without access to entrance facilities and interoffice facilities on a shared or dedicated basis.

In its NPRM, the FCC seeks comment on whether it should retain and/or modify these requirements.

California urges the FCC to retain this unbundling requirement. The reason that there is competition from CLECs is because of the FCC's unbundling requirement. Removing the requirement that transport be unbundled at cost-based rates will only reduce the degree of competition for broadband services.

### D. Other Network Elements

Since passage of the 1996 Act, one of the most pervasive and persistent problems has been competitor access to the manual and electronic systems used by ILECs for pre-ordering, ordering, provisioning, maintenance, repair and billing. The availability of Operations Support Systems ("OSS") is where the rubber meets the road in the development of a competitive telecommunications market. Nothing can "impair" a competitor's successful entry into a market more effectively than slow, inefficient and inaccurate methods for processing customer orders and service requests. Without access to OSS at parity with the ILEC to afford the CLECs a reasonable opportunity to compete with the ILEC's retail operations, the competitive market will falter and stagnate.

In the UNE Remand Order, the FCC found that requesting carriers were impaired without access to ILEC OSS functions, signaling networks and call-related databases. California believes that nothing has significantly changed that would justify the removal of this unbundling requirement. CLECs continue to

need access to pre-ordering, ordering, provisioning, maintenance, repair and billing on the same basis as the ILEC in order to serve their customers with the same quality of service provided by the ILEC. OSS is a necessary part of the day-to-day business relationship between carriers, and should continue to be a mandated UNE available nationally.

Because the CPUC is currently considering whether CLECs have nondiscriminatory and cost-based access to Pacific's OSS functions in connection with Pacific's section 271 application, the CPUC is not able at this time to comment on related unbundling issues raised in this proceeding. As discussed above, the CPUC will submit its decision on Pacific's application in this proceeding upon issuance.

## IV. THE ROLE OF THE STATES

The FCC should continue to allow states to supplement current unbundling requirements, tailored to particular local market conditions. Previously, the FCC recognized that the degree of competition in individual geographic markets may depend upon a competitor's ability to secure network elements from sources other than the incumbent LEC. For this reason, the FCC gave the states discretion in Rule 317, 47 C.F.R. § 51.317, to require an incumbent LEC in a given market to provide additional UNEs to further the pro-competitive goals of the 1996 Act. The FCC should maintain this rule. To be sure, Rule 317 effectuates

congressional intent in the 1996 Act to permit states to supplement or complement federal rules.

Specifically, section 251(d)(3) of the 1996 Act expressly provides:

> "In prescribing and enforcing regulations to implement the requirements of this section, the Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission that (A) establishes and interconnection obligations of local exchange carriers; (B) is consistent with the requirements of this section; and (C) does not substantially prevent implementation of the requirements of this section and the purposes of this part."

Congress thus recognized in section 251(d)(3) the unique and desired role that states necessarily play in tailoring interconnection obligations to the specific conditions within particular local markets.

Congress' recognition of the important role of the states in promoting local competition is further evidenced in sections 261(b) and (c). Subsection (b) provides that "[n]othing in this part shall be construed to prohibit any State commission from … prescribing regulations [after the date of enactment of the 1996 Act] in fulfilling the requirements of this part, if such regulations are not inconsistent with the provisions of this part." Subsection (c) provides that "[n]othing in this part precludes a State from imposing requirements on a telecommunications carrier for intrastate services that are necessary to further competition in the provision of telephone exchange service or exchange access, as long as the State's requirements are not inconsistent with this part or the commission's regulations to implement this part." The 1996 Act thus reserves to the states the "ability to impose additional requirements so long as the

requirements are consistent with the Act and 'further competition.'" MCI Telecommunications Corp. v. U.S. West Communications, 204 F.3d 1262, 1265 (9th Cir. 2000) (citing section 261(c)); In re Petition of Verizon New England, 2002 Vt. LEXIS 12 (Vt. Supreme Court, February 22, 2002).

In California's view, section 251(d)(1) further permits the FCC to delegate authority to the states to specify additional UNEs, based on local market conditions. Section 251(d)(2) does not limit the FCC's authority but simply requires the FCC to determine "what network elements should be made available for purposes of subsection (c)(3)…" Section 251(c)(3) in turn states that ILECs are under a duty to provide "nondiscriminatory access to network elements on an unbundled basis any technically feasible point on rates, terms and conditions that are just reasonable and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252."

Consistent with AT&T Corp. v. Iowa Utils. Bd., where the Court made clear that the states, consistent with federal standards, "may determine the concrete result in particular circumstances," the FCC may delegate to the states, consistent with federal standards, the ability to make case-by-case factual determinations, based on particular circumstances, whether additional UNEs should be required. Allowing the states to take into account individual conditions recognizes the value to the nation as a whole in allowing diversity among the states, and effectuates the cooperative federalism that underlies the 1996 Act.

## V. CONCLUSION

There can be no serious dispute that the state of competition today is far less than what was contemplated six years ago when the 1996 Act was adopted. Moreover, competition with the ILECs is far weaker than the level that existed just two years ago. The ILEC continues to remain the dominant provider of broadband services in all regions, and continues to retain control over essential bottleneck facilities necessary for non-affiliated carriers to offer competing services. At the same time, the ILEC has thrived and continues to expand its provision of these services with the latest technologies under the current regulatory structure.

In light of this, California believes that it is premature for the FCC to reduce the ILEC's unbundling obligations, and urges the FCC not to do so. California also urges the FCC to adopt clear and simple unbundling rules, and to refrain from adopting detailed rules, differentiating services and providers in

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various ways. A detailed approach inevitably will create regulatory and market uncertainty that will inhibit, not promote, competition and the consumer benefits that it provides.

Respectfully submitted,

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